

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

DECISION NOT TO PURSUE
5/22/13
\$222,491.86
past costs
written off.
In Circles 5/29/13
(BSW)

SUBJECT: Recommendation Not to Pursue Cost Recovery Action for the
Oceana Salvage Site, Virginia Beach City, Virginia Beach
County, Virginia

FROM: Leo J. Mullin, Cost Recovery Expert
Cost Recovery Branch (3HS62)

LJM 5-21-2013

Thomas A. Cinti, Senior Assistant Regional Counsel
Office of Regional Counsel (3RC42)

TAC 5/21/13

TO: Kathryn A. Hodgkiss, Acting Director
Hazardous Site Cleanup Division (3HS00)

Marcia E. Mulkey, Regional Counsel
Office of Regional Counsel

THRU: Joanne Marinelli, Chief, Cost Recovery Branch (3HS62)

This memorandum summarizes the basis for a recommendation not to pursue further cost recovery activities in connection with the Oceana Salvage Site ("Site") in Virginia Beach City, Virginia. The Site is a scrap metal and recycling facility that ran from 1960 to the present. During that period of time, acid and other material from lead based batteries were recovered which left lead battery carcasses and lead contaminated soils at the Site. Also, an access road that leads into the Site property appears to have used spent battery casings as the foundation for the road. The response action was conducted by the current site owner, Julia Malbon, and EPA. The removal action began on September 26, 2008, the day that the Administrative Order on Consent became effective. Most of the response actions that were conducted by Mrs. Malbon were completed by December 2008. EPA's unreimbursed costs through May 15, 2012, are \$222,491.86.

I. Site Description

The Site consists of the Oceana Salvage Yard, a 9.074 acre parcel which was used as an automobile and truck salvage yard. The Site also includes a portion of the Oceana Naval Air Station property that is adjacent to the Oceana Salvage Yard.

II. Site Background

The property is adjacent to a family campground and to the Oceana Naval Air Station. In 1937 the property was owned by Rodney and Lucetta Malbon. In 1968, the Malbons conveyed their interest in the property to their son, Rodney Malbon, Jr. On August 31, 2001, upon the death of Rodney Malbon, Jr. the property was conveyed to his widow, Julia Malbon.

According to an environmental survey that was prepared for the Naval Facilities Engineering Command in 1997, the Site was used as a scrap yard as early as 1960. The specific location that is defined as the Site is an access road. According to a 1993 Memorandum from the Virginia Department of Environmental Quality ("VaDEQ"), Rodney Malbon, Jr., explained that the lead contamination at the Site relates to crushed battery parts that were placed there in the 1960's for use as a base for the road bed.

III. Actions Conducted

Since 1990, the Site has been the subject of several cleanup actions that were required by VaDEQ. All the actions were intended to address the release or threat of release of hazardous substances that relate to automobile scrap operations.

On May 8, 2007, Laura Casillas, EPA On-Scene Coordinator, issued a memorandum entitled "Recommendation for Determination of Imminent and Substantial Endangerment at the Oceana Salvage Site." This memorandum identified two threats. The first threat related to two piles of battery casings created during a previous cleanup effort. Both piles contained elevated lead concentrations and were not disposed of properly. The second threat related to lead contamination along a road which runs through the adjacent Naval Air Station property that provides the only access to the salvage yard from Oceana Boulevard.

Sampling of the waste pile showed concentrations of 19,500 part per million ("ppm") of lead. Concentrations of 13,100 ppm lead were detected near the southern area of the property along the end of the access road. A January 2006 Trip Report had documented lead levels of 149,000 ppm and visible battery casings on the access road to the property. This same report explained that the battery casings were used as paving material.

On September 25, 2008, an Administrative Settlement and Order On Consent For Removal Response Action, In the Matter of: Oceana Salvage Site, Docket No. CERC-03-20008-0170DC ("AOC") was executed by EPA and Julia Malbon (Respondent) as the owner of the Site. Most of the work required under this AOC was completed within a two-week period of time.

Approximately 1,200 cubic yards of soil and debris were treated using lead-binding technology. Both EPA and the Respondent sampled the treated soils. The soils were tested using the Toxicity Characteristic Leachate Procedure (TCLP) to determine whether the untreated soil constitutes a hazardous waste. EPA and the Respondent took post-excavation samples of soils beneath the piles to determine the total lead content of those soils and whether additional excavation would be necessary. Laboratory results showed that all but one 250-cubic-yard soil pile passed TCLP criteria. The pile that did not pass TCLP criteria was re-treated and re-sampled on November 10th. The rest of the piles were graded into the onsite berm.

EPA approved the soil piles to be capped, once laboratory results for the remaining pile showed the soil in the pile passed TCLP. The property owner completed on-site construction work on November 15th, 2008.

At this point in time, the primary actions that must be completed relate to institutional controls for the Site.

IV. Statute of Limitations

Since the institutional controls are not yet implemented, the removal action continues and the Statute of Limitations has not yet started to run.

V. Potentially Responsible Parties

Oceana Salvage, Inc.

Oceana Salvage, Inc. ("Oceana") is a corporation that was incorporated in the Commonwealth of Virginia on August 12, 1991. It operated a scrap yard at this location, renting the property initially from Rodney M. Malbon, Jr. At the time Oceana was created, its sole shareholder was Rodney M. Malbon, Jr. When Mr. Malbon passed away on August 31, 2001, consistent with the instructions of his will, the sole shareholder became Julia Malbon, Rodney M. Malbon, Jr.'s wife. Mrs. Malbon continued the scrap metal operation until 2005, when she agreed to lease the property to Anolia Recycling, LLC.

Based on available information, Oceana is the continuation of a sole proprietorship that was created by Rodney M. Malbon, Jr. in the 1960's. Therefore, in addition to being the operator of the Site from 1991 on, an argument can be made that Oceana is the successor to the scrap metal activities that were started in the 1960s and continued on through the founding of Oceana.

In response to an information request, EPA has been provided with tax returns and other financial information that relate to Oceana. A review of the financial information indicates that Oceana has minimal assets. The assets that Oceana previously held that had value (e.g. the scrap) were transferred to Mrs. Malbon ("scrap transfer") as part of the probate process that related to her husband's estate. Although EPA has sufficient information on which to base a cost recovery claim against Oceana, because of the scrap transfer, there are no company assets that can be used to reimburse EPA for its response actions.

Rodney M. Malbon, Jr.

Rodney M. Malbon, Jr. operated a scrap metal operation at this location since the 1960s. In 1991, he incorporated Oceana Salvage, Inc. From 1991 until his death on August 31, 2001, he was the sole shareholder of Oceana.

Mr. Malbon also acquired ownership of the Site property on September 3, 1968, when the property was conveyed to him by his parents, Rodney M. and Lucetta K. Malbon. Since the specific date for the installation of the road bed is unknown, it is possible that his ownership may have occurred after the road bed was created. Even if this is true, the use of the property for scrap metal reclamation would have contributed to the lead contamination at the Site. Due to this, EPA has sufficient information on which to base a claim of liability against Mr. Malbon as an owner and operator of the Site.

Although a basis exists for making a claim against Mr. Malbon's estate, the period of time during which to make such a claim has expired; therefore, one is not recommended.

The Estates of Rodney and Lucetta Malbon

The parents of Rodney M. Malbon, Jr., Rodney M. Malbon, and Lucetta K. Malbon owned the Site property from 1937 to 1968. If the road bed were installed prior to 1968, a claim against the elder Mr. and Mrs. Malbon could be made. Further investigation into when the road bed was created was considered but since Rodney M. Malbon passed away in March 1973 and his wife, Lucetta Malbon, passed away in February 1985, even if EPA could prove that the battery casings were placed on the property during their period of ownership, the period of time to file a claim against either estate has expired.

Julia Malbon

Mrs. Malbon became the owner of the Site when her husband died in 2001. Also, when her husband passed away, she took an active role in the corporate affairs of Oceana. Although Mrs. Malbon may have had an innocent landowner defense based on her initial inheritance of the property, her subsequent management of Oceana voids that defense and creates the basis for EPA to identify Mrs. Malbon as the current owner of the Site.

Due to Mrs. Malbon's ownership of the Site property and the continuation of the scrap operation by Oceana, a general notice letter was sent to Mrs. Malbon on December 19, 2006. Initially, Mrs. Malbon claimed that she did not have the financial capability to perform the removal response action at the Site and provided EPA with information concerning her financial status. EPA performed an ability to pay analysis ("ATP analysis") based on this financial information and determined that since the cost of the removal action at that time, was estimated to be less than \$100,000, that Mrs. Malbon would not incur an undue financial hardship by implementing the response action.

Since the AOC became effective several events have occurred that required EPA to revisit the ATP analysis. First, the estimated cost of the Site work more than doubled upon implementation of the AOC. To pay for the work, Mrs. Malbon took out a personal loan that has a balance owed of more than \$35,000. Second, EPA's costs which relate to oversight of the response action, discussions with the Navy, and formalizing the needed institutional controls at the Site are more than twice the estimated cost of the remedy. Third, at the time that the AOC was issued, Mrs. Malbon had not fully explained the relationship with the current tenant at the Site, Anolia Recycling, LLC. The lease agreement originally required monthly rental payments of \$10,000 a month and the rental payments were scheduled to escalate to more than \$12,000 a month by November, 2012. These payment terms were a significant factor in the initial determination that no financial hardship would occur if Mrs. Malbon were to undertake the response action. Since then, Mrs. Malbon has provided information that explains why the rental payment has been reduced to \$8,000 a month, and that she incurs significant legal expenses in making the tenant honor the terms of the lease agreement.

A more complete explanation of Mrs. Malbon's financial condition is contained in the memorandum entitled "Ability To Pay Analysis of Julia Malbon and Oceana Salvage, Inc."

Based on this updated analysis, it was determined that Mrs. Malbon should not be required to make any additional payment toward the costs of the Site cleanup.

The United States Navy

The Site was initially identified as a larger area that included both the Oceana property and real property that is part of the Oceana Salvage Naval Air Station. Also, during the early stages of the Site removal action, Counsel for Mrs. Malbon explained that he had evidence of disposal at the Site by the United States Navy ("Navy").

Subsequently, the Navy decided to conduct a response action on its portion of the Site property. The Navy's action substantially reduced the estimated cost for the cleanup on the Oceana property. Due to the reduced costs of the removal action and the significant transaction costs that would be incurred by Mrs. Malbon were she to pursue a contribution action against the Navy at the Site, this avenue of investigation was not pursued. In light of these facts, existing evidence does not support EPA's pursuing a claim against the Navy at the Site. Additionally, as a practical matter, without the existence of litigation against the Navy by a private party at the Site, EPA would not be able to recover monies for the Site from the Navy.

Anoia Recycling, LLC.

Anoia Recycling, LLC ("Anoia, LLC") is an entity that was created in the Commonwealth of Virginia on October 18, 2005. The sole member of Anoia, LLC is Nick Anoia. On October 16, 2005, Julia Malbon entered into a lease agreement with Anoia, LLC. Under the terms of the agreement, Anoia, LLC agreed to rent the Site property for a ten year period of time with monthly payments starting at \$10,000 a month which would escalate to more than \$13,000 a month. Effective December 14, 2006, Anoia, LLC registered ownership of the Fictitious Name "Oceana Salvage."

Anoia, LLC has operated a scrap metal salvage operation at the site since 2005. Although its corporate status is distinct from that of Oceana Salvage, the address used by Anoia, LLC is Unit 203 of a waterfront condominium located at 316 Winston Salem Avenue, Virginia Beach, Virginia. Mrs. Malbon's personal residence is located at Unit 201 in this same building. Mrs. Malbon's initial financial disclosure identified the \$10,000 a month rental payment from Anoia, LLC but did not explain what happened to the assets previously owned by Oceana.

Due to the incomplete explanation from Mrs. Malbon, in 2012, EPA issued Anoia, LLC several information requests for the purpose of determining if EPA has a basis for identifying Anoia, LLC as a current operator at the Site or as a corporate successor to Oceana.

Anoia, LLC did not respond to EPA's initial information request nor to subsequent efforts by EPA to obtain the needed information. Normally, such significant disregard for an information request by a potentially responsible party ("PRP") at a site would result in EPA's taking of an enforcement action to require the PRP to provide the necessary information and seek penalties. Such action is not recommended at this point, for the following reasons. The amount of unreimbursed response costs for the Site is small in comparison to the costs the Agency would need to incur to enforce the information request. Also, EPA has already obtained from Mrs. Malbon most of the information needed to complete its analysis of this matter. Moreover, the

response action addressed Site conditions that existed prior to the date of execution of the lease agreement. In light of these facts, Anويا, LLC either had no, or a minimal, role regarding the areas of the Site that were the subject of the response action. Further, at best, the information Anويا, LLC would provide would be used by EPA to prove that Anويا, LLC is a successor to Oceana. Were it needed for EPA to prove this matter in court, the case would be a weak one at best, as currently, none of the elements needed to prove successor liability appear to be present. The costs for such litigation also would significantly outweigh the amount of EPA's unreimbursed Site costs. Finally, and most importantly, a review of public records indicates that Nick Anويا has a series of unpaid bills and judgments to his name.

At this time, Anويا, LLC's rental payments are Mrs. Malbon's primary source of income. Without this rental income, she would likely incur an extreme financial hardship. Counsel for Mrs. Malbon has provided evidence that indicates Anويا, LLC's rental payment is often late and when it is paid, is often after her attorney has threatened Anويا, LLC with possible eviction. Mrs. Malbon has sought a new tenant; however, in today's real estate market she has been unable to find a lessee willing to pay the current rental amount. Were EPA to take an enforcement action against Anويا, LLC, the company would likely, break its Site lease. The resulting loss of rental income to Mrs. Malbon could create an extreme financial hardship for her.

VI. Response Costs Associated with the Site

EPA's unreimbursed costs through May 15, 2012, are \$222,491.86.

VII. Discussion of Potentially Responsible Parties and the Basis Not to Pursue Further Cost Recovery Action

This memo recommends that no cost recovery action be pursued against the PRPs identified at the Site.

Most of the individuals who operated at the Site are deceased. The corporation that operated there has no assets. One individual, Julia Malbon, inherited the business and the Site property from her husband. Had Mrs. Malbon decided to close the business she would not have had any liability at the Site. Instead, she operated the business for a few years. She also paid for the initial response action at the Site. Since then, the Site costs have increased to a point that any additional payment on her part is likely to create a financial hardship for her.

The majority of the costs relate to EPA's oversight and enforcement-related activities at the Site. A minimal amount of these costs relate to the actual Site cleanup activities since Mrs. Malbon undertook the removal action under the AOC.


During the course of the Site investigation, EPA made inquiries concerning Anويا, LLC, the business entity that currently operates at the Site. Although Anويا, LLC has not responded to EPA's information requests, EPA has obtained information that suggests Anويا, LLC may not have any liability at the Site. Given the small dollar amount of EPA's unreimbursed Site costs and the amount of costs EPA would need to incur to take action against Anويا, LLC to enforce the information request, EPA has determined that such action is not warranted.

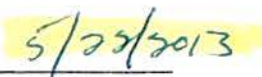
Due to the case circumstances described above, no additional efforts should be undertaken by EPA to recover the unreimbursed Site costs.

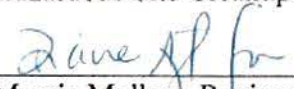
IX. Conclusion

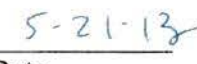
At this time, no viable PRPs have been identified at the Site. This memo recommends that EPA exercise its enforcement discretion to forgo further cost recovery efforts at this Site. In accordance with EPA's *Policy on Cost Recovery Where Site Costs Total Less than \$200,000* issued by the Office of Enforcement and Compliance Assurance on May 15, 1995, (dollar threshold has since been raised to costs totaling < \$500,000), this memo recommends that the Site costs be written off so that the Region's limited enforcement resources can be devoted to other enforcement priorities.

I concur:


Kathryn A. Hodgkiss, Acting, Director
Hazardous Site Cleanup Division


Date


Marcia Mulkey, Regional Counsel
Office of Regional Counsel


Date

I do not
concur:

Kathryn A. Hodgkiss, Acting, Director
Hazardous Site Cleanup Division

Date

Marcia Mulkey, Regional Counsel
Office of Regional Counsel

Date